

3. The services are performed in a continuing relationship and are not in the nature of a single transaction.

Statutory Non-employees

There are several categories of employment under Missouri Employment Security Law which are exempted from coverage of unemployment insurance and are therefore not reportable for unemployment tax purposes. The following types of employment are exempted under RSMo. Section 288.

RSMo. Section 288.032

- A for-hire motor carrier is not the employer of a lessor, or of a driver receiving remuneration from a lessor, unless it is a 501(c)(3) or government employer. RSMo. Section 288.032.3
- A person in a beauty salon who does not receive salary, wages or other compensation from the operator and pays rent to the owner. RSMo. Section 288.032.4, Code of State Regulation 8 CSR 10-4.140

RSMo. Section 288.034

- A person under 18 years of age delivering newspapers. RSMo. Section 288.034.12(3)
- Direct Sellers engaged in the delivering or distribution of newspapers or shopping news. RSMo. Section 288.034.12(4) and (17)
- Sole proprietor or partner's parents, spouse, and children under 21 (natural, adopted, step, foster). RSMo. Section 288.034.12(5)
- Workers covered by a federal unemployment insurance system (railroad workers and federal employees). RSMo. Section 288.034.12(7)
- Service in the employ of a foreign government. RSMo. Section 288.034.12(8)
- Service in the employ of an instrumentality wholly owned by a foreign government (with conditions). RSMo. Section 288.034.12(9)
- Service covered by an approved reciprocal agreement with an agency charged with administering any other state or federal unemployment insurance law. RSMo. Section 288.034.12(10)
- Service by a student earning less than \$50 in a quarter from the school, not counting board, room and tuition. RSMo. Section 288.034.12(11)
- Licensed insurance agent remunerated solely by commission. RSMo. Section 288.034.12(12)

- Certain Subsidized Employment Programs. RSMo. Section 288.034.12(14)
- Work study program (COE) for a nonprofit or public school for which academic credit is given. RSMo. Section 288.034.12(15)
- Licensed real estate salesperson where at least 80% of remuneration is for services not hours, under a written contract providing the individual will not be treated as employee for federal tax purposes. RSMo. Section 288.034.12(16)
- Direct seller selling consumer products, not affiliated with a retail establishment, where at least 80% of remuneration is for services not hours, under a written contract providing the individual will not be treated as an employee for federal tax purposes. RSMo. Section 288.034.12(17)
- Volunteer research subject paid on a per study basis for scientific, medical or drug related testing by an organization except a 501(c)(3) or government entity. RSMo. Section 288.034.12(18)
- Full-time student working less than 13 weeks for an organized summer camp. RSMo. Section 288.034.15
- Remodeling salesman acting as an independent contractor unless the Internal Revenue Service has ruled that there is an employer/employee relationship. RSMo. Section 288.034.18

Additional exemptions for governmental and 501(C)(3) employers:

1. Work performed for a church. This includes service for an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches. RSMo. Section 288.034.9(1); Section 288.034.12(6)
2. Service as an ordained minister. RSMo. Section 288.034.9(2)
3. Work in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury. RSMo. Section 288.034.9(4)
4. Services performed for an employment work-relief or work training program assisted or financed by any federal or state agency by an individual receiving the work relief or work train-

- ing. RSMo. Section 288.034.9(5)
5. Services performed by an inmate in a penal institution. RSMo. Section 288.034.9(6)
6. Work for a school, college, or university if the work is done by an enrolled student or the student's spouse, if certain conditions are met. RSMo. Section 288.034.9(7)

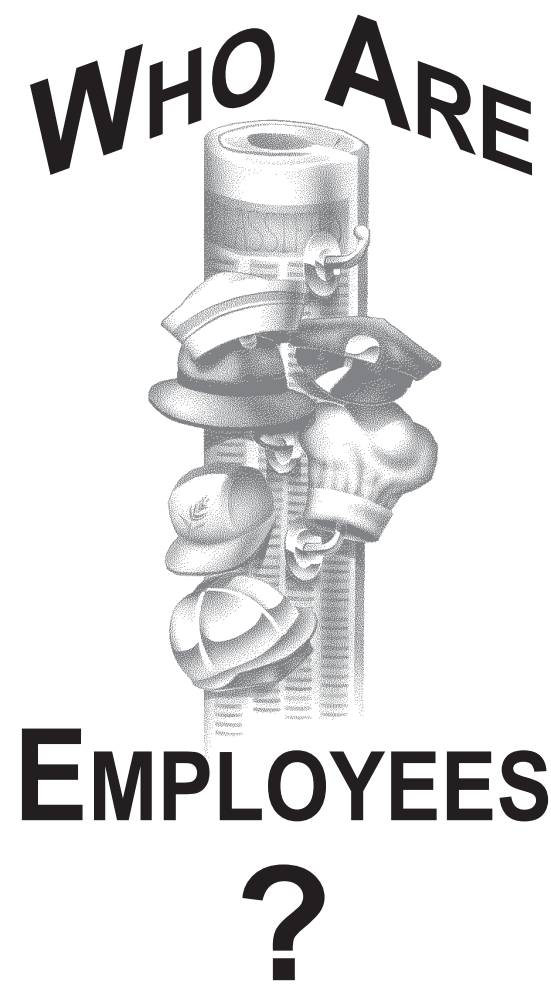
Services provided for governmental employers:

- As an elected official. RSMo. Section 288.034.9(3)(a)
 - As a member of a legislative body or a member of the judiciary. RSMo. Section 288.034.9(3)(b)
 - As a member of the state national guard or air national guard. RSMo. Section 288.034.9(3)(c)
 - On a temporary basis in the case of fire, snow, earthquake, flood or similar emergency. RSMo. Section 288.034.9(3)(d)
 - In a major non-tenured policymaking or advisory position which normally does not require more than 8 hours per week. RSMo. Section 288.034.9(3)(e)
- In addition to the above, RSMo. Section 115.101, states that an election judge is not an employee of the election authority.
- None of these exclusions apply when the employer voluntarily elects coverage under RSMo. Section 288.080.**

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Who are employees?

The determination of whether an individual is an employee or not is important for several reasons for Missouri Unemployment Tax purposes.

- Under Missouri law, wages paid to *employees* are subject to employment taxes paid by the employer.
- Only compensation paid to *employees* is used to calculate unemployment benefits for that employee should he or she become unemployed through no fault of their own.

The individual performing a service for a business may be:

1. A common law employee.
2. An independent contractor.
3. A statutory employee.
4. A statutory non-employee.

With the exception of statutory employees and statutory non-employees, worker classification is based upon a common law standard for determining whether a worker is an independent contractor or employee.

A worker is an **employee** if he or she is one of the following:

- A common law employee. (See common law employee section below.)
- An employee as defined by statute, commonly referred to as a "statutory employee" (see statutory employee section below.)

Common Law Employees

Common Law is the body of law developed primarily from judicial decisions based on custom and precedent, unwritten in statute or code. A common law employee is a worker who is an employee under regular common law rules. These rules hold that a worker's status as an employee or as an independent contractor hinges on the business' right to control the worker. Anyone who performs a service for wages is an employee if the employer can control what will be done and how it will be done. If an employer-employee relationship exists, it does not matter what it is called. The employee may be called an agent or contract labor. It does not matter how payments are measured or paid, what the payments are called or if the employee works full or part time. Under the Missouri Employment Security Law, an individual

may not waive their rights to unemployment insurance coverage.

For employment tax purposes, no distinction is made between classes of employees. Superintendents, managers, and other supervisory personnel are all employees. An **officer of a corporation** is generally an employee, but a **director** is not. An officer who performs no services or only minor services, and neither receives nor is entitled to receive any pay, is not considered an employee.

Service performed by an individual for payment is employment unless an employer can show to the satisfaction of the Division that the employer/employee relationship does not exist. When considering the employee/independent contractor issue, the Division does not recognize "Section 530 Safe Harbor" of the Internal Revenue Service.

Independent Contractors

People such as lawyers, contractors, subcontractors, public stenographers, and auctioneers who follow an independent trade, business, or profession in which they offer their services to the public, are generally not employees. However, whether such people are employees or independent contractors depends on the facts in each case. The general rule is that an individual is an independent contractor if the payer, has the right to control or direct only the result of the work and not the means and methods of accomplishing the result.

Following the common law standard, the employment tax regulations provide that an employer-employee relationship exists when the business for which the services are performed, has the right to direct and control the worker who performs the services. This control refers not only to the result to be accomplished by the worker but also the means and details by which that result is accomplished. In other words, a worker is subject to the will and control of the business not only as to what work shall be done but also how it shall be done. It is not necessary that the business *actually* direct or control the manner in which the services are performed, it is sufficient if the business has the *right* to do so.

In an employer-employee relationship, it makes no difference how it is labeled. The **substance** of the relationship, **not the label**, governs the worker's status. To determine whether the control test is satisfied

in a particular case, the facts and circumstances must be examined. Questions about the relationship between the worker and the business are asked to ascertain the degree of control.

Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties as shown below.

Behavioral control. Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of-

- Instructions the worker receives concerning the work. An employee is generally subject to the employer's instructions about when, where, and how to work. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved.
- Training the worker is given. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

Financial control. Facts that show whether the business has a right to control the business aspects of the worker's job include:

- The extent to which the worker has unreimbursed business expenses. Employees may incur unreimbursed expenses in connection with the services they perform for their business, however, independent contractors are more likely to have unreimbursed expenses than employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are important.
- The extent of the worker's investment. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not required.
- The extent to which the worker makes services available to the relevant market.
- How the business pays the worker. An employee is generally paid by the hour, week, or month. An independent contractor is usually paid by the job. However, it is common in some professions, such as law, to pay independent contractors hourly.
- The extent to which the worker can realize a profit or incur a loss. An independent contractor can have a profit or loss, an employee usually is paid

for the time worked.

Type of relationship. Facts that show the parties type of relationship include:

- Written contracts describing the relationship the parties intended to create.
- Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.
- The permanency of the relationship. If a worker is engaged with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.
- The extent to which services performed by the worker are a key aspect of the regular business of the company. If a worker provides services that are a key aspect of regular business activity, it is more likely that the employer will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

Statutory Employees

Some categories of workers who may be independent contractors under the common law are treated by statute as employees. The Missouri Employment Security Law names the following two types of statutory employees:

- Agent or commission- drivers who distribute food products (other than milk), or laundry or dry cleaning for his or her principal.
- A full-time traveling or city salesperson who solicits on behalf of, and the transmission to his or her principal, orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments.

To be covered under Missouri Employment Security Statutes, an employee in one of the statutory employee categories must meet all the following requirements:

1. The worker must perform substantially all of the services personally.
2. The worker has no substantial investment in the facilities. (Other than transportation.)